Supreme Court, U.S.
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No. 10-320

IN THE

Supreme Court of the United States

ANWAR HAQUE,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

On Petition For A Writ of Certiorari to the New York Supreme Court, Appellate Division, Second Department

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 19, 2010

QUESTION PRESENTED

Is the record on direct appeal in this case sufficient to review petitioner's claim that counsel provided too harsh a warning about the deportation consequences of a plea offer where the record fails to reflect the advice given by counsel and where petitioner never availed himself of the collateral procedure provided by the state to supplement the record?

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No. 10-320

In the

SUPREME COURT OF THE UNITED STATES

October Term, 2010

ANWAR HAQUE,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

From January, 1999, until search warrants were executed and he was arrested on July 23, 2002, petitioner and his confederates engaged in a complex scheme to defraud credit card companies. Petitioner and his accomplices engaged scores of credit card holders to submit phony charges disguised as

purchases at several small businesses in Jackson Heights so as to defraud credit card companies of massive sums of money.

For these acts, petitioner was charged with Money Laundering in the First Degree (New York Penal Law § 470.20 [1][b][ii]), Grand Larceny in the Second Degree (New York Penal Law § 155.40 [1][b]) [five counts]), Grand Larceny in the Third Degree (New York Penal Law § 155.35), Falsifying Business Records in the First Degree (New York Penal Law § 175.10) [ten counts]), Conspiracy in the Fourth Degree (New York Penal Law § 105.10 [1]), and Scheme to Defraud in the First Degree (New York Penal Law § 190.65) [two counts]).[1] Thereafter, he proceeded to trial before the Honorable Roberta Dunlop, a Justice of the New York State Supreme Court, and a jury.

The evidence at trial established that petitioner and his accomplices repeatedly submitted to merchant processor banks charges – often exceeding by large amounts the credit limits on a specific credit card – on multiple credit card accounts for fictitious purchases of

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[1] Prior to petitioner's trial, co-defendants Kaium Shah and Barkat Ali pled guilty to Money Laundering in the First Degree. Shah was sentenced on November 22, 2005, to an indeterminate term of from one to three years in prison and Ali, on February 17, 2005, to a term of one and one-third to four years in prison. Co-defendant Sardar Uddin pled guilty to Grand Larceny in the Second Degree and was sentenced on June 15, 2004, to time served and a conditional discharge. Co-defendant Abed Jim Shrayef interrupted the joint trial with defendant to plead guilty on April 21, 2004, to Money Laundering in the Second Degree, and he was sentenced on March 25, 2005, to a split sentence with three month of jail time and five years of probation.

goods and services by numerous card holders. By petitioner's use of phony paperwork created to make the transactions appear to be bona fide, the credit companies were importuned to pay the charges to the business entities used by petitioner and his co-conspirators. The card holders and merchants split the proceeds of the fraudulent transactions as cardholders "busted out" their accounts, as the practice is commonly referred to in the credit card industry, by failing to make payments for the fictitious charges.

By this scheme, which is commonly referred to as "true name fraud," petitioner and his co-conspirators were able to steal well over $ 6.8 million, in amounts ranging from the more than $1.7 million defrauded from Chase and $1.5 million from American Express to slightly over $44,000 from Wells Fargo. In November, 2001, the scheme began to unravel when several of the credit card companies and banks conducted a review of credit card accounts that had been closed for non-payment and discovered a pattern of large monetary transactions among a group of Queens merchants.

Prior to and during trial, the prosecution offered petitioner opportunities to plead guilty and receive a reduced sentence. When questioned by the court about a potential disposition during trial, counsel stated that he needed to conduct a further investigation into the deportation consequences of the plea (T. 5242-43). The record made at that time does not reflect the crime to which defendant was asked to plead guilty or the proposed sentence. Petitioner eventually rejected all plea offers.

Petitioner was later convicted of one count of Money Laundering in the First Degree (New York Penal Law § 470.20 [1][b][ii]), five counts of Grand Larceny in the Second Degree (New York Penal Law § 155.40 [1]), one count of Grand Larceny in the Third Degree (New York Penal Law § 155.35), three counts of Falsifying Business Records in the First Degree (New York Penal Law § 175.10), and single counts of Conspiracy in the Fourth Degree (New York Penal Law § 105.10 [1]), and Scheme to Defraud in the First Degree (New York Penal Law § 190.65 [1][a]). He was sentenced to indeterminate prison terms totaling twenty-two years, six months, to sixty-four years, six months.

At sentencing, petitioner arranged for several people to speak on his behalf. A relative of petitioner explained that petitioner had not accepted any plea offer because, in part, of the "risk of deportation" (S. 43) Later, during petitioner's lengthy speech to the sentencing court, petitioner stated that he rejected a pretrial offer of six months in jail and five years of probation because of the "fear of shame and the possibility of deportation" (S. 53-54). He also stated at another point, "Were [he] to be deported," he would "face leaving [his] children or taking them away from this great country" (S. 53-54) At yet another point in the sentencing proceedings, petitioner stated, "I am not a citizen, Your Honor, and this conviction will cause me to be deported" (S. 53-54). The record does not indicate the offense to which defendant would have pled guilty, and does not otherwise reveal what counsel did or did not tell petitioner regarding the immigration consequences of his plea. Nor does the record

otherwise support petitioner's assertion that he was made an offer, at any time, with a proposed sentence of only six months' jail time and five years' probation.

On appeal to the Appellate Division of the New York Supreme Court, Second Judicial Department, petitioner, by a different attorney than had represented him at trial, raised numerous objections primarily to evidentiary rulings made during the course of and before the trial as well to some of the instructions to the jury. He also argued that the application of the money laundering statute to conduct that both preceded and continued after the Money Laundering statute was amended violated the ex post facto clause of the United States Constitution and a similar provision in the New York Constitution. Finally, petitioner's brief by counsel also argued that the evidence was legally insufficient, that the verdict was against the weight of the evidence, and that the sentence imposed on petitioner was excessive.

After prosecutors responded to the brief prepared by petitioner's attorney, petitioner requested and was granted permission to file, pro se, a supplemental brief. In that brief, too, petitioner argued that the evidence, at least as to the grand larceny counts, was insufficient and the convictions against the weight of the evidence.

In addition, petitioner's pro se brief raised a new claim, made for the first time, that his trial attorney was constitutionally ineffective. Among his many complaints about his representation, petitioner said that he was offered "[a] plea of six months jail and five

months probation," that "[t]he record shows that defense counsel was under the impression that acceptance of any plea would result in deportation [and that t]he record also shows that had it not been for the deportation consequences [petitioner] would have accepted the plea." (Pro Se Supplemental Brief to the Appellate Division at 63).

The Appellate Division affirmed the judgment of conviction on February 16, 2010. *People v. Haque*, 70 A.D.3d 967, 897 N.Y.S.2d 130 (2d Dept. 2010). As to petitioner's ineffectiveness claims, the Appellate Division said only that "trial counsel provided meaningful representation and, thus, [petitioner] was not deprived of the effective assistance of counsel." 70 A.D.3d at 968, 897 N.Y.S.2d at 131. The Appellate Division also noted that "the aggregate maximum term of imprisonment for the consecutive grand larceny sentences must be deemed to be 20 years," 70 A.D.3d at 969, 897 N.Y.S.2d at131, thus effectively reducing petitioner's sentence.

In an application for leave to appeal to the New York Court of Appeals, petitioner's state appellate counsel repeated most of the arguments that both counsel and petitioner pro se had presented including, without elaboration, a claim of "ineffective assistance under state and federal constitutions" (Letter of Gary Muldoon, dated March 2, 1010, at 6). Petitioner also filed an affidavit in support of the application, arguing, in part, that counsel provided ineffective assistance in rendering advice about the deportation consequences of the plea (Affidavit of Anwar Haque, dated March 17, 2010). A judge of the New York Court of Appeals, the

Hon. Susan Read, denied petitioner's leave application on June 19, 2010. People v. Haque, 15 N.Y.3d 750, 906 N.Y.S.2d 823, 933 N.E.2d 222 (2010).

Petitioner now seeks a writ of certiorari directed to the Appellate Division, New York's intermediate appellate court.

REASONS FOR DENYING THE WRIT

Petitioner contends that certiorari should be granted so that he may present what he calls "a straightforward and compelling claim of ineffective assistance" (Petition at 9). He claims that counsel warned him that he would necessarily be deported if he accepted an offer to plead guilty during trial, that that advice was inaccurate, and that he rejected the plea based on counsel's advice.

The record on this direct appeal, however, is insufficient to review these contentions. Nothing in the record establishes what advice counsel gave to petitioner, and thus it cannot be determined whether the advice given was accurate or not. Similarly, in the absence of evidence as to what advice counsel gave, it cannot be determined whether it was counsel's advice, rather than a family member's or an immigration attorney's advice, upon which petitioner ultimately relied. As a result, this case fails to present for review the issue petitioner now proffers. For this reason alone, certiorari should be denied.

Moreover, because petitioner did not place on the record sufficient facts to review the claim, he failed

to give the state courts an adequate opportunity to consider the contention. Before this Court will review a claim raised by a state criminal defendant, the issue must be first presented to the state courts. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). The state court record here, however, was insufficient to present the issue, and petitioner failed to avail himself of the procedure provided by the state courts for developing facts outside the record, namely a collateral motion for a new trial under section 440.10 of the New York Criminal Procedure Law. Absent such a record, the state courts did not have a sufficient basis to review the claim.

Petitioner in any event failed to establish a claim of ineffectiveness in the state courts. This is so, if for no other reason, because the record simply does not support the factual premise of his claim – that counsel told him he would necessarily be deported as a result of the plea. As a result, he could not prevail in this Court.

Nor was the state appellate court required to order a hearing on this issue, as petitioner now suggests. Both the state courts and this Court have recognized that collateral review presents the optimal procedural vehicle for ineffective counsel claims, and the state court committed no constitutional error by relegating petitioner to that procedure. Moreover, petitioner never requested the state court to hold a hearing on this issue, and thus any purported constitutional requirement to hold a hearing was not properly presented below.

In short, this case simply does not present petitioner's current contention for review, both because the record does not contain sufficient facts for consideration of the issue and because the issue, lacking adequate factual development, was not properly presented to the state courts. For both these reasons, and because petitioner could not prevail in this Court based on the record on direct appeal, certiorari should be denied.

A. The Record is Insufficient to Review the Question Presented by Petitioner

This case fails to present for review the issue that petitioner wishes this Court to decide. The issue petitioner asks this Court to review, in the "Question Presented" section of his petition, is whether it is "ineffective assistance for an attorney to wrongly inform his client that he *will* face mandatory deportation if he accepts an offered plea . . . ." He argues in the body of the petition that he was offered a plea to an offense that was not an aggravated felony, that he thus would have been eligible for cancellation of removal had he accepted the plea, and that counsel "obviously" did not provide that information to petitioner (Petition at 9-11).

Despite petitioner's claim that the record on direct appeal is "abundantly clear" on this point (Petition at 10), the record fails to disclose what advice was rendered by defense counsel. At best, it indicates that petitioner did not want to face the "possibility" of deportation attendant to the proposed plea. Whether counsel advised defendant that he would necessarily be

deported, whether he included any advice regarding the possibility or likelihood of cancellation of removal, or whether family or immigration counsel provided any advice upon which petitioner may have relied simply are issues that cannot be resolved on this record. Thus, this record does not present petitioner's claim for review.

In order to obtain review in this Court, petitioner claims that the record is "clear" in establishing that trial counsel gave "misleading advice," or, at minimum, failed to "give correct advice" Petition at 10. Similarly, in state court, petitioner maintained that "[t]he record shows that defense counsel was under the impression that acceptance of any plea would result in deportation" (*Pro Se* Supplemental Brief to the Appellate Division at 63). But neither is even remotely accurate. Far from showing what was trial counsel's "impression" or, indeed the advice he gave, the portion of the trial record to which petitioner makes reference quotes the attorney as saying that petitioner was "concerned about the fallout from immigration" should he plead guilty to an unstated lesser offense and that the attorney would need to investigate that question further (Petition at 5-6). Thus, however "painfully clear" it might have been that petitioner was concerned about the deportation consequences of a plea (Petition at 17), the record establishes nothing about what counsel told petitioner, much less that it was incorrect or misleading.

Likewise, the sole portion of the record to which petitioner makes reference to support his contention

about the eventual outcome of his attorney's immigration inquiries is his own unsupported and unsworn explanation to the sentencing judge, after the jury rendered its guilty verdict, as to why he did not accept an offer to permit him to plead guilty to a lesser offense "before this trial ever began." Petition at 6-7. In explaining to the sentencing judge why he did not accept some plea offer "before this trial ever began" (thus not apparently referring to the mid-trial offer that he now references), petitioner suggested that he could not do so because of "the fear of shame and the *possibility of deportation* to my former country..." (Petition at 6-7) (emphasis added). To characterize this statement to the trial judge about his fears of "the possibility of deportation" as being "abundantly clear" evidence that counsel told him that he would necessarily be deported and failed to inform him of the possibility of cancellation of removal is simply inaccurate.

Moreover, elsewhere in the sentencing proceedings, there were similar references to the rejection of the prior plea deal as being based on a possibility, rather than a certainty, of deportation as a result of the plea offer. A relative speaking on petitioner's behalf at sentencing referred to the rejection of the offer as being based on a "risk" of deportation (S. 43). Similarly, petitioner himself referred to what might have occurred "[w]ere [he] to be deported" as a result of the prior plea. These record references to the possibility of deportation indeed belie defendant's claim that counsel told him that deportation was guaranteed.

Petitioner's other statement at sentencing, after he had been convicted by a jury, that "this conviction will cause me to be deported" (S. 54), is similarly insufficient to establish what counsel said to petitioner about the prior plea offer. First, it is unclear whether petitioner was speaking about his conviction after trial or the plea he was previously offered. This is particularly true given the post-trial timing of the statement and the use of the present tense in making this statement. Second, even assuming the reference was to the potential conviction on a rejected plea offer, the statement was offset by the instances in which much more tentative phrasing was used in relation to the immigration consequences of the prior plea, including his reference to merely the "possibility of deportation" and his relative's reference to the "*risk* of deportation." Thus, the single phrase in petitioner's sentencing proceeding that his "conviction will cause" his deportation – inserted between other conditional references to potential immigration consequences – is far from "obvious" proof that his counsel told him that he necessarily would be deported if he accepted the prior plea and that counsel thereafter failed to explain the possibility of the cancellation of removal.

Moreover, even assuming that the record of the sentencing proceedings were sufficient to show that petitioner had been given inaccurate advice, it does not show who provided that advice. Indeed, at no point during the sentencing does petitioner or his relative state that counsel gave him the advice upon which he allegedly relied in making his decision. Whether family members, such as those who spoke at sentencing, provided advice upon which petitioner

chose to rely, or whether counsel's investigation included referral to an immigration attorney, as is often the case, simply cannot be determined on this record. For this reason too, the record is insufficient to review the claim that counsel provided inadequate advice.[2]

Still further, there is nothing in the record that even establishes that petitioner was ever offered a plea to six months' jail time and five years' probation, other than his own self-serving statement made during his lengthy and rambling sentencing speech. Indeed, neither defense counsel nor the prosecutors refer to a prior plea offer on these terms. And even petitioner's own statement at sentencing fails to indicate the offense or offenses to which he would have pleaded guilty. Thus, the record is not even sufficient to show that he was offered a plea to a crime that could have afforded him cancellation of removal.[3]

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[2]The record does not even identify the specific charge to which petitioner would have pled guilty, something that, under New York law, was not his to decide alone and required the prosecutor's consent. *See* N.Y. C.P.L. § 220.10 (3). Since whether petitioner's contention, made here for the first time, that the unspecified theft offense he says he could have pled guilty to was not an "aggravated felony" under the terms of 8 U. S. C. §§ 1101(a)(43), 1229b (a), *see* Petition at 16, could turn on exactly what offense petitioner might have pled guilty to, as well as the sentence he would have received, the incomplete record presents yet another reason why this record provides an inadequate basis to review defendant's claim.

[3]As petitioner concedes, a theft offense for which a sentence of more than one year is imposed is an aggravated felony, which precludes an application for cancellation of removal (*see* Petition

For all these reasons, petitioner's current attempt to extrapolate backwards from the statements made at sentencing fails. Notwithstanding the fact that petitioner feared removal, the statements at sentencing simply failed to establish what counsel stated, whether or not it included any reference to the possibility of the cancellation of removal, whether petitioner received advice from any other source upon which he chose to rely, or even what the rejected plea deal was.

Indeed, the very most that could be said of the record in this case is that it raises a factual question over what advice was actually given by counsel. But this Court does not ordinarily grant certiorari to review factual issues. *See* Sup. Ct. Rule 10 ("A petition for certiorari is rarely granted when the asserted error consists of erroneous factual findings"); E. Gressman, K. Geller, S. Shapiro, T. Bishop, and E. Hartnett, *Supreme Court Practice* ch. 6.37(I)(3) p. 505 (9th Ed. 2007) ("the Supreme Court does not ordinarily grant review in such "fact bound" cases). Nor is this case an exceptional one warranting review even though the factual issue, rather than the legal one, predominates.

Finally, petitioner's case is particularly unworthy of review because he had, and *still has*, an opportunity to supplement the very limited record on direct appeal and obtain review of his claim in state court based upon a record adequate to the task. As

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at 16). If the actual plea offered involved such a sentence, counsel would have been fully justified in warning petitioner about deportation in the strongest possible terms.

explained below, the state provides a post-conviction procedure in the trial court to determine factual issues such as those alleged here under section 440.10 of the New York Criminal Procedure Law. Petitioner, however, has never availed himself of this procedure, choosing instead to draw inferences from a record that fails to support them. Nor has petitioner ever alleged that his trial attorney has become unavailable to participate in such a proceeding or that petitioner would otherwise be unable to provide affidavits or evidence in such a forum. Given the availability of a state procedure to resolve the factual claim petitioner raises, petitioner should not be permitted to press his claim on a record that, at best, provides some circumstantial approximation of what counsel might have said, rather than on what he actually did say.

In short, even assuming petitioner were correct on the law, this case turns on questions of fact, ones that this record does not answer. Because the record in this case would provide at best only a very truncated circumstantial basis for review, and because another procedure exists under state law for development of the factual basis of the claim, certiorari should be denied.

B. Petitioner Failed to Properly Present His Claim to the State Courts Because He Failed to Make an Adequate Record for Review Using the Procedure the State Provides for that Purpose.

Petitioner failed to properly present his claim for review in the state courts. When he attempted to raise the issue in the Appellate Division, petitioner presented the state court with an inadequate record to

review the claim he now makes, even though he could have made a full record by availing himself of the state post-conviction procedure specifically designed for this purpose. Because he thus failed to provide the state courts with a full and fair opportunity to review the claim, this Court should deny certiorari.

This Court has regularly adhered to the rule that, in reviewing state court judgments, a petitioner's federal claim must be properly presented to, or "expressly decided" by, the state courts. *Adams v. Robertson*, 520 U.S. 83, 86 (1997); see *Kentucky v. Stincer*, 482 U.S. 730, 747 n. 22 (1987) (internal quotation marks and citations omitted); *see also Cardinale v. Louisiana*, 394 U.S. 437 (1969); *Tacon v. Arizona*, 410 U.S. 351, 352 (1973). This is because, among other things, in a federal system, it is important for the state courts to consider the federal constitutional issue first before the federal judiciary steps in to correct any error. *Cardinale*, 394 U.S. at 438; *Illinois v. Gates*, 462 U.S. 213, 221 (1983).

Here, petitioner did not properly present his claim to the state court because he failed to develop the factual basis of his contention, choosing to raise the issue on direct appeal instead of using the procedure provided by the state for addressing matters outside the record. First, for the reasons stated above, the record in this case was inadequate to the task of reviewing counsel's advice. At best, there were ambiguous references to advice concerning immigration, without any attribution to the attorney. Thus, petitioner failed to provide the Appellate

Division with an adequate basis upon which to decide his claim.

Second, petitioner failed to avail himself of the procedure provided under state law to elaborate on factual contentions not made out by the record on direct appeal. New York has long provided a vehicle for presenting off-the-record claims in support of a motion to vacate a conviction, particularly one based on an assertion that a defendant's trial attorney provided constitutionally ineffective assistance. *Lyons v. Goldstein*, 290 N.Y. 19, 47 N.E.2d 425 (1943). *See People v. Bachert*, 69 N.Y.2d 593, 598, 516 N.Y.S.2d 623, 509 N.E.2d 318 (1987). As the New York Court of Appeals has long observed, the codification of this basis for relief from a conviction on facts outside the record of the original proceeding, Article 440 of the New York Criminal Procedure Law, makes it apparent that "in the typical case it would be better, and in cases such as this one essential, that an appellate attack on the effectiveness of counsel be bottomed on an evidentiary exploration by collateral or post-conviction proceeding brought under CPL 440.10." *People v. Brown*, 45 N.Y.2d 852, 853-854, 410 N.Y.S.2d 287, 382 N.E.2d 1149-50 (1978). Petitioner, however, failed to avail himself of this procedure, and, in so doing, deprived the state courts of a full "evidentiary exploration" of his claim.

Nor was the issue now raised by petitioner with regard to counsel's immigration advice "expressly decided" by the state courts. Indeed, nothing in the Appellate Division's decision, or the New York Court of Appeals' denial of leave, made any reference to the

immigration advice provided by counsel or to the requirements of state or federal law regarding immigration advice. Petitioner is thus hard pressed to claim in this Court that the state courts "expressly" addressed his claim.

Furthermore, while the Appellate Division did make a general statement concerning the effectiveness of counsel, this part of the opinion did not "expressly" address petitioner's claim, nor did it otherwise necessarily decide the claim. Petitioner in his *pro se* supplemental brief wrote twelve pages of complaints about counsel going far beyond immigration advice to such matters as the purported failure to seek suppression, the failure to make motions to dismiss during trial, the failure to request appropriate instructions, and the failure to object to various portions of the court's charge. More important, all of the other ineffectiveness claims raised by petitioner were reflected in the record, which was adequate for review of those claims. As a result, it is not at all clear that the Appellate Division's statement refers to petitioner's plea advice claim, rather than the many claims petitioner raised that were reviewable on the record presented to the court. Indeed, petitioner himself describes the claim as "disregarded" by the state courts (Petition at 9). Accordingly, petitioner cannot credibly maintain that the Appellate Division "expressly" decided the specific issue he now seeks to raise.

Because petitioner failed to make an adequate record on direct appeal upon which to base his claim and failed to make a proper motion so that an adequate

record could be made, he failed to properly present his claim in state court. And because petitioner's failure to properly present his claim below would raise a procedural impediment to review in this Court, the petition for certiorari should be denied.

C. Even Assuming the Record Is Adequate for Review and That the Issue Had Been Properly Presented to the State Courts, the Petition Should Be Denied Because Petitioner Has Failed to Establish That Counsel Was Ineffective.

Even assuming that petitioner's claim could be reviewed based on the sparse record provided, petitioner falls far short of establishing ineffectiveness. This is so for several reasons.

First, petitioner failed to make out the factual premise of his claim, for all of the reasons stated above. The record reveals, at most, that counsel warned petitioner that he could be deported, not that counsel told petitioner that he necessarily would be deported, as petitioner now contends.

Indeed, nothing in this record establishes that counsel over-warned petitioner. Even under petitioner's interpretation of the record, the plea offered in this case would have rendered him "deportable" under 8 U.S.C. § 1227 (Petition at 16), the same statute that rendered the defendant deportable in *Padilla v. Kentucky*, __ U.S.__, 130 S. Ct.

1473 (2010).[4] As such, counsel was required, as *Padilla* itself directs, to inform petitioner that he was subject to "presumptively mandatory," "automatic," or "practically inevitable" deportation. *Id.* at 1477, 1478, 1480. This alone would explain the quite justifiable concern petitioner expressed at the time of sentence that he was likely to have been deported as a result of a plea.

Moreover, nothing in this record establishes that counsel failed to inform petitioner about the *possibility* of cancellation of removal, even assuming that counsel was required to give that advice. The record affirmatively reflects in several places that petitioner was concerned with a "risk" or "possibility" of deportation, which is fully consistent with counsel having discussed the limited remedies available to avoid deportation. And because, as this Court noted in *Padilla*, cancellation of removal is nothing more than the "limited remnants of equitable discretion vested in the Attorney General," *id.* at 1480, counsel would have erred had he suggested anything more than that cancellation was a possibility.

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[4] Both the provision that petitioner says would have applied to him, 8 U.S.C. § 1227(a)(2)(A)(i)(II) (*see* Petition at 16, n. 1), and the one that applied to Padilla, 8 U. S. C. §1227(a)(2)(B)(I), describe the consequences of such a conviction by the word "deportable." Interestingly, in his affidavit to the New York Court of Appeals in support of his application for leave to appeal, petitioner claimed that trial counsel told him that, if he accepted the plea, he "would be a deportable alien." *See* Affirmation of Anwar Haque, dated March 17, 2010 at par. 9. This advice would appear to be completely accurate.

Similarly, defendant's single ambiguous statement at sentencing that "this conviction will cause me to be deported" (S. 53-54) is readily attributable to petitioner's status after the jury's verdict, which rendered him guilty of an aggravated felony for which cancellation of removal was not available.[5] And even assuming that the statement referred to the prior plea offer, it could easily be explained as reflecting petitioner's understanding that deportation was "practically inevitable" despite the possibility of cancellation of removal. Indeed, it is likely that the limited, discretionary possibility of cancellation of removal after deportation proceedings were instituted would have provided cold comfort to petitioner. Thus, petitioner 's fully justified concern over deportation at the time of sentence simply fails to establish that counsel told petitioner that he would necessarily be deported as a result of a plea.

Nor has petitioner established that cancellation of removal was even available to petitioner, under the plea offers extended to him. Cancellation of removal is available to those who have been lawful permanent resident aliens for five years or more, who have resided continuously in this country for more than seven years, and who have not committed aggravated felonies. *See* 8 U.S.C. § 1229b(a). As petitioner concedes, a theft offense, such as those charged in this case, is an

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[5]Petitioner was convicted of five counts of Grand Larceny in the Second Degree and sentenced to from four to twelve years on each count. Under 8 U.S.C. § 1101(a)(43)(G), a theft offense is an aggravated felony for immigration purposes if "the term of imprisonment [is] at least one year."

aggravated felony where the term of imprisonment is at least one year (Petition at 16). *See* 8 U.S.C. § 1101(a)(43)(G). Here, petitioner cites to no portion of the record establishing that he was a lawful permanent resident alien for five years prior to his crimes. Moreover, petitioner has failed to establish the actual terms of the plea offers made to him. Indeed, nothing in the record supports petitioner's self-serving statement in his lengthy, wandering sentencing speech that he was made an offer of six months' jail and five years' probation prior to trial. Indeed, neither defense counsel nor the prosecutors made any reference to such a lenient deal and the other two defendants who were allowed to plead guilty prior to trial were offered and received sentences of more than one year in jail.[6] If the offer here were similar to those offers, then cancellation of removal would not be available.

Second, notwithstanding his claim that this case falls "squarely within" *Padilla* (Petition at 9), nothing in *Padilla* requires that counsel minimize the prospect of deportation when it is presumptively mandatory. To the contrary, the logic and holding of *Padilla* is that counsel must inform a defendant about the harsh consequences of deportation. Where, as here, a defendant is subject to "presumptively mandatory," "automatic," or "practically inevitable" deportation, *Padilla* directs that counsel tell him so in no uncertain terms. That case does not compel counsel to raise his client's hopes that he will obtain a purely discretionary

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[6]One co-defendant pled guilty to a lesser sentence during trial, but petitioner's reference at sentencing was clear to pre-trial plea offer (S. 53).

remedy that might or might not someday materialize. Indeed, to do so would seem to be contrary to the central point of *Padilla*, to ensure that the client is aware of the severe, "practically inevitable" consequences that attach to his conviction and that he is willing to accept that consequence.

Third, petitioner has failed to establish that, had he been informed about the possible remedy of cancellation of removal, he would have chosen to take the plea. Indeed, had counsel informed petitioner of the remedy, he would also have had to inform petitioner that he would nevertheless be subject to immediate deportation proceedings and that the remedy was wholly discretionary in nature. If petitioner took the plea, he would thus be placing the dispositive question regarding his ability to remain in this country in the hands of immigration authorities, undoubtedly a frightening prospect to a non-citizen. By contrast, the only option available to petitioner that could have resulted in escaping deportation proceedings entirely was a trial and acquittal. Petitioner could easily have preferred this option of avoiding deportation proceedings altogether over placing his fate wholly in the hands of immigration authorities.

Nor could petitioner prevail in this Court on his claim that he established prejudice solely because of the disparity between the sentence offered pursuant to a plea and the sentence actually imposed. Contrary to petitioner's suggestion, the issue is, at its core, a factual one, to be decided based on all the relevant facts and circumstances. The question, pursuant to

Strickland's prejudice prong, is whether petitioner would have accepted the plea had he been informed of the wholly discretionary possibility of cancellation of removal. This in turn would depend on considerations other than the absolute number of years that petitioner was offered pursuant to the plea and the sentence he eventually received. It includes petitioner's and counsel's reasonable assessment of the evidence at the time the plea offer was made and the credibility of petitioner's claim that he would have been willing to give up the possibility of avoiding deportation proceedings altogether, which he could only have achieved by going to trial and obtaining an acquittal. The issue, then, is necessarily dependent on more than the disparity in the offered and received sentences. And even assuming such a disparity could support a finding of prejudice, the state court was not compelled to accept that conclusion, particularly where, as here, no such finding was ever made.

Equally unavailing is petitioner's criticism of the state court for citing the state constitutional standard for ineffective counsel claims in its decision (Petition at 22-23). Initially, as petitioner acknowledges, his many claims of ineffectiveness were made, in part, based on the state constitution, and thus it is hardly surprising that the court chose to recite the state standard for such claims. Moreover, both the New York Court of Appeals and the Second Circuit have acknowledged that the state standard is more generous to defendants than the federal standard. *See* Rosario v. Ercole, 601 F.3d 118, 123-26 (2d Cir. 2010); *People v. Turner*, 5 N.Y.3d 476, 480, 840 N.E.2d 123, 806 N.Y.S.2d 154 (2005); *People v. Stultz*, 2 N.Y.3d 277, 284 n. 12, 810

N.E.2d 883, 778 N.Y.S.2d 431 (2004). This is so because under state law, a defendant need not satisfy *Strickland*'s stringent, outcome-determinative prejudice test in order to obtain relief. *See People v. Caban*, 5 N.Y. 3d 143 (2005). If the error is sufficiently egregious, a state defendant may obtain a reversal even in the absence of a reasonable probability of a different result. *Id.* Thus, contrary to petitioner's contention, nothing in the state court decision suggests that the state relied on a standard stricter than the one applicable under federal law.

In sum, petitioner could not prevail on his claim in this Court, even if it had been properly presented to the state courts and was properly before this Court. Petitioner has failed to establish on this record that counsel provided constitutionally inadequate advice, or that he would have traded the possibility of an acquittal and the avoidance of deportation proceedings entirely for the wholly discretionary remedy of cancellation of removal.

D. The State Was Not Required to Order a Hearing on Petitioner's Claim, But Could Properly Relegate the Claim to Collateral Review.

Petitioner's suggestion that the state should have ordered a hearing to resolve any factual questions presented by the record (Petition at 10, 23, n.3) is of not avail to him. Two reasons mandate this conclusion.

First, petitioner never argued below that the state courts were constitutionally compelled to order a hearing on this claim. Indeed, petitioner never requested a hearing at all regarding his claim, either as a matter of state or federal constitutional law, and never so much as admitted the possibility that the record was ambiguous as to his claim (*see Pro Se* Supplemental Brief at 63-64). Petitioner thus failed to present this contention to the court hearing his appeal, much less present the claim in federal constitutional terms, as required as a prerequisite to review in this Court. *See Howell v. Mississippi*, 543 U.S. 440, 443-44 (2005).

Second, petitioner has failed to show the existence of a constitutional entitlement to a hearing on direct appeal, particularly where the state provides an alternate remedy to obtain a hearing that petitioner has failed to use. In fact, as to complaints of ineffective counsel in particular, this Court has recognized that collateral post-judgment motions are not only permissible to resolve the factual and legal issues attendant to such claims, but are the preferred method for addressing these issues.

Referring to the federal analogue to New York's 440 motion, this Court concluded in *Massaro v. United States*, 538 U.S. 500, 504-05 (2003), that the trial court is "the forum best suited to developing the facts necessary to determining the adequacy of representation" at the trial level. *Id.* at 505. This Court explained, "When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed

precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose." *Id.* By contrast, in a post-judgment collateral motion in the trial court, the defendant "has a full opportunity to prove facts establishing ineffectiveness of counsel, the government has a full opportunity to present evidence to the contrary, the district court hears spoken words we can see only in print and sees expressions we will never see, and a factual record bearing precisely on the issue is created." *Id.* at 506 (quoting *United States v. Griffin*, 699 F.2d 1102, 1109 [11th Cir. 1983]). Thus, the "better-reasoned approach is to permit ineffective-assistance claims to be brought in the first instance in a timely motion" in the trial court, and "[t]his so even if the record contains some indication of deficiencies in counsel's performance." *Id.* at 504.

Thus, the procedure provided by the state court for resolving factual issues regarding ineffectiveness claims was not only permissible, but perfectly appropriate. Accordingly, petitioner cannot now complain that the state court violated his rights under the federal constitution by declining to order a hearing on direct appeal, particularly considering that none was requested.

CONCLUSION

Petitioner seeks review of an issue that is not presented by the record in this case, which wholly fails to provide an adequate basis for review of his claim. The record was similarly inadequate when presented to the Appellate Division, depriving that court of a full and fair opportunity to review his factual and legal contentions. Nor was the state court constitutionally compelled to order a hearing on direct appeal to supplement the record, as the state provides an alternative procedure for that purpose, one petitioner never sought to use. Finally, even if petitioner's claim were otherwise appropriate for review, it would necessarily fail, as petitioner cannot show on this record that counsel gave constitutionally deficient advice.

Respectfully submitted,

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